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IN DEFENSE OF MODERN FEDERAL HABEAS CORPUS FOR STATE PRISONERS

DONALD CHISUM*

NO ASPECT of the jurisdiction of the lower federal courts has been as controversial as habeas corpus jurisdiction—in particular habeas jurisdiction for inmates of state prisons. That jurisdiction has expanded greatly during the past few decades—expanded both in the doctrinal sense of what grievances may be pursued in a federal habeas proceeding and in the quantitative sense of the number of habeas corpus petitions filed by state prisoners annually in the United States district courts.

This growth of the “modern” writ of habeas corpus has been accompanied by a chorus of dissenting voices. The level of criticism has varied from scholarly concern for the proper functioning of the institutions and procedures of the criminal justice system to bitter resentment of federal encroachment on “states rights.” Two recent examples of this criticism (both on levels between the two extremes) are the *American Bar Association Journal* article “The Case Against Modern Federal Habeas Corpus” by George Cochran Doub,¹ and the testimony of William H. Rehnquist before the Senate Subcommittee on Constitutional Rights, in which Mr. Rehnquist urged that a limitation on habeas corpus jurisdiction be included in the proposed Speedy Trial Act of 1971.² Both are significant, the former because it appeared in a periodical widely circulated among lawyers and the latter because as Assistant Attorney General, Mr. Rehnquist

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1. Doub, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A.J. 323 (1971).

2. Mr. Rehnquist's testimony is reported in 10 CRIMINAL L. RPTS. 2102 (1971).

spoke for the current administration and now sits as Associate Justice of the Supreme Court.

On the other side of the ledger, few have come forward as defenders of the modern writ of habeas corpus. The primary beneficiaries of the expanded writ are the inmates of state prisons, but, as a class, inmates have virtually no political power or voice and only very limited access to the communications media. Lawyers for inmates could be expected to defend their interests, but inmates tend, as a class, to be indigent and few are represented by counsel beyond the trial and direct appeal stages of the criminal process.³ Federal judges are a potential source of support, but have generally opposed habeas corpus jurisdiction because of the workload it poses and the allegedly large volume of frivolous petitions.⁴ Instead, the cause of habeas corpus has been espoused almost exclusively by Justices of the United States Supreme Court—most notably Justice Brennan—and by a few legal scholars.⁵

With such a narrow base of support, the future of the modern writ must be considered uncertain at best. Proposals for Congressional restriction have failed in the past.⁶ However, the constant criticism may yet sway Congress or a more conservatively constituted Supreme Court. The criticism has the more mediate effect of inducing a niggardly attitude by federal judges, below the level of the Supreme Court, in the interpretation and application of habeas corpus law. This article will attempt briefly to counter the princi-

3. See Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal Correctional Process*, 18 KAN. L. REV. 493 (1970).

4. See Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1948).

5. Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50 (1956); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Reitz, *Federal Habeas Corpus: Post Conviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960).

6. Two major unsuccessful efforts have been H.R. 5649, 84th Cong., 1st Sess. (1955) and an aborted provision (§ 702(a)) in the bill which became Omnibus Crime Control and Safe Streets Act of 1968 (see S. REP. No. 1097, 90th Cong., 2d Sess. (1968)). 2 U.S. CONG. AND ADM. NEWS 2112, 2150-53, 2220-22 (1968). In 1968, seven senators courageously defended federal habeas corpus for state prisoners: "A hundred years of experience under the Federal habeas corpus provisions forcefully demonstrate that absolute reliance on State courts to protect Federal rights does not adequately protect these rights." S. REP., *supra* (minority views) 2 U.S. CODE CONG. & ADM. NEWS at 2222 (1968).

pal criticisms of the modern federal writ of habeas corpus for state prisoners.

DIMENSIONS OF THE MODERN WRIT

The lively debate over the historical development of the writ of habeas corpus still lacks a definitive resolution. Justice Brennan has argued that the scope of the writ has always been broad.

Of course standards of due process have evolved over the centuries. But the nature and purpose of habeas corpus have remained remarkably constant. History refutes the notion that until recently the writ was available only in a very narrow class of lawless imprisonments.⁷

Justice Harlan, on the other hand, adopting generally the analysis of Professor Paul M. Bator, has argued that the scope of federal habeas corpus review for persons imprisoned under a judgment of criminal conviction and sentence by a state court has evolved and expanded through three historical periods.⁸ The first began in 1867 when Congress first granted to the federal courts jurisdiction to inquire into the legality of persons in state custody⁹ and ended in 1915 with the decision in *Frank v. Mangum*.¹⁰ During this period, the scope of inquiry was solely as to whether the state court that rendered the judgment of conviction lacked "jurisdiction" as a matter of federal law. In the second period, after *Frank*, the scope of inquiry broadened.

[I]n addition to questions previously thought of as "jurisdictional," the federal courts were now to consider whether the applicant had been given an adequate opportunity to raise his constitutional claims before the state courts. And if no such opportunity had been afforded in the state courts, the federal claim would be heard on its merits.¹¹

The federal writ attained its present "modern" scope only after the decision in *Brown v. Allen* in 1953.¹² From the *Brown* decision to the present day the custody of a state prisoner is considered

7. *Fay v. Noia*, 372 U.S. 391, 402-03 (1963). See also Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961).

8. *Fay v. Noia*, *supra* note 7, at 448-76 (1963) (dissenting opinion).

9. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

10. 237 U.S. 309 (1915).

11. *Fay v. Noia*, *supra* note 7, at 456 (1963) (dissenting opinion).

12. 344 U.S. 443 (1953).

contrary to federal law if he can show in a federal habeas corpus proceeding that his state conviction was infected by a violation of his federal constitutional rights. It is not enough that the state court afforded the prisoner a full and adequate opportunity to present his federal constitutional claim and denied that claim on the merits. The custody is still unlawful if in the judgment of a federal habeas corpus judge the state court decided that claim erroneously.¹³

In comparison, the "Harlan-Bator" position is probably the better interpretation in this historical debate. The scope of inquiry under the modern writ is broader than in times past. That the Court departed from history in *Brown v. Allen*, of course, does not inevitably mean that it did so unwisely or without justification.

In a series of decisions handed down after *Brown v. Allen*, the Court solidified the broad scope of the federal habeas corpus remedy for state prisoners. It broadened the concept of "custody," the jurisdictional prerequisite of habeas corpus, holding that parole was sufficient custody.¹⁴ It restricted the mootness doctrine, holding that unconditional release from custody will not abort a habeas proceeding because of the normal collateral consequences of conviction.¹⁵ It abolished the prematurity doctrine, allowing immediate habeas attack on a consecutive sentence to be served some time in the future.¹⁶ It clarified the circumstances under which the federal court can and must hold an evidentiary hearing.¹⁷ Finally, it eliminated the adequate state ground rule in habeas corpus, ruling that a prisoner's failure in the past to press his federal constitutional claim in the state courts can bar federal habeas corpus relief only if he "deliberately by-passed" available state remedies.¹⁸ In short, the "modern" federal writ of habeas corpus has developed into the major vehicle through which the federal courts review the administration of criminal justice in the courts of the several States.

13. This de novo review, however, relates only to questions of law. The federal habeas corpus judge may defer to a state court's findings of facts if they were made after a "full and fair" evidentiary hearing. See *Townsend v. Sain*, 372 U.S. 293 (1963); 28 U.S.C. § 2254(d) (1968).

14. *Jones v. Cunningham*, 371 U.S. 236 (1963).

15. *Carafas v. La Vallee*, 391 U.S. 234 (1968).

16. *Peyton v. Rowe*, 391 U.S. 54 (1968).

17. *Townsend v. Sain*, *supra* note 13, at 293.

18. *Fay v. Noia*, *supra* note 7.

CRITICISM OF THE MODERN WRIT

Professor Bator is the leading academic critic of the modern writ.¹⁹ He expresses no quarrel with the scope of inquiry prior to *Brown v. Allen*. Habeas review by a federal court is fully justified, according to Bator, when the state courts have not afforded "full corrective process for the litigation of questions touching on federal rights."²⁰ But he fails to find sufficient justification for allowing a federal judge on habeas corpus simply to redetermine the merits of federal questions decided by a state court in the course of a criminal proceeding.

Adopting a cost-benefit approach, Bator follows two lines of analysis. The first is into the weight of affirmative justifications of the broadened inquiry. The second is into the damage caused to legitimate state and federal interests.

The simplest affirmative justification for collateral review is that an avenue of relitigation is important to assure that decisions on constitutional rights leading to incarceration are "correct" in an absolute sense. This will not do, according to Bator, because mere repetition of the process gives no assurance of greater reliability in the result unless there are institutional reasons why the second tribunal is better fit for the task than the first.²¹

Bator examines two such institutional factors which have been suggested as establishing the special fitness of a federal court. The first is the notion that federal judges are experts in federal law and hence more likely to make a "correct" decision. Bator discounts this factor, however, on the ground that state judges are apt to have as much experience in adjudicating federal constitutional claims of criminal defendants as federal judges.²² The second factor is the institutional independence of federal judges that allegedly places them in a better position to adjudicate federal constitutional rights in an objective, conscientious, and sympathetic manner. They are not directly involved in the administration of the state's criminal laws or the guilt-determining process. They enjoy life tenure that

19. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

20. *Supra* note 19, at 499.

21. *Supra* note 19, at 454.

22. *Supra* note 19, at 509.

helps insulate them from the full impact of popular pressures for "law and order" that may be inconsistent with the full recognition of constitutional rights. Professor Bator does acknowledge that this second factor has some force. Yet he somehow feels that it is an inadmissible consideration.

Implicit in the whole structure is the need for confidence that the state courts will conscientiously apply to a case the *whole* of the applicable law, including the federal law. One tends, therefore, to resist the notion that our procedural system should be built on the opposite premise, that state-court judgments about federal rights bearing on state cases should be automatically ignored on the basis of rather nebulous and open-ended assumptions about their inadequacy.²³

While Professor Bator thus questions the affirmative need for federal habeas review, he and other critics rely most heavily on three elements of damage that expansive federal collateral review of state convictions is supposed to cause to legitimate interests. The first is in terms of the alleged effect upon state judges who must pass initially on the federal constitutional claims of the defendant. Federal habeas review is said to cause irritation of and resentment by state judges. The notion is that it is "unseemly for a federal district judge to reverse the action of the highest court of the state. . . ." ²⁴ Such review is said to erode the "inner sense of responsibility" of state judges.²⁵

The second element is in terms of the alleged effect upon the substantive aims of the criminal law. The lack of finality in the criminal process caused by habeas review is said to dilute the deterrent function of the criminal law: "Surely it is essential . . . that we be able to say that one violating that law will swiftly and certainly become subject to punishment, just punishment."²⁶ The lack of finality is also said to impede the rehabilitation aim of the criminal process. Until the convict realizes that he is "justly subject to sanction," the "cardinal moral predicate" of rehabilitation is missing.²⁷

The third and final element of damage spoken of is in terms of the alleged effect on the functioning of the federal courts. The dra-

23. *Supra* note 19, at 511.

24. *Supra* note 19, at 505.

25. *Supra* note 19, at 506.

26. *Supra* note 19, at 452.

27. *Supra* note 19, at 452.

matic rise in the number of habeas corpus petitions filed by state prisoners is cited and described by Professor Bator and nearly every other critic as a "flood."²⁸ Since an overwhelming percentage of these petitions turn out to be without merit, the conclusion is reached that valuable federal judicial resources are being diverted from more important tasks. Furthermore, it is argued, "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones."²⁹

While the nature of the criticism of the modern writ tends to be monotonously uniform, the suggested cures vary. Some critics simply advocate revisions to prevent abuses of the writ such as repetitious applications. They would provide greater weight to state findings of fact, introduce time limitations on the presentation of claims, and expand the concept of waiver.³⁰ Professor Bator would go further and roll back habeas corpus to its role prior to *Brown v. Allen*. Federal habeas courts would then decide the merits of a constitutional claim only if the state court failed to provide full opportunity to the petitioner to litigate that claim. The most extreme cure would be complete abrogation of the jurisdiction of the federal courts to inquire into the legality of the custody of a person incarcerated pursuant to a state court judgment in a criminal proceeding.³¹

THE MODERN WRIT AND THE SUSPENSION CLAUSE

When faced with proposals for Congressional action to limit the scope of the writ of habeas corpus in the federal courts, a defender of the writ is tempted to fall back on the Constitution. Article I,

28. *Supra* note 19, at 506.

29. *Supra* note 12, at 536-37.

30. Doub, *supra* note 1, at 327-8.

31. In a recent article, Attorney General Mitchell listed three possible cures for habeas corpus. Mitchell, *Restoring the Finality of Justice*, 55 JUDICATURE 203, 206 (1971). The first would follow Judge Friendly's proposal that certain constitutional claims would be open only if the petitioner makes a "colorable showing of innocence." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). The second would "limit the habeas corpus claims to those concerning the reliability of the fact-finding process." The third would be to "establish a federal forum, other than the Supreme Court, to provide direct review of state and federal convictions [as a substitute for the present-day application of federal habeas corpus]." Mitchell indicated that the Department of Justice was examining all the alternatives.

section 9, of the United States Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The temptation is to be resisted. It is not so much that the constitutional defense is weak or totally lacks merit, but rather that reliance on the Constitution tends to embroil the defense in doctrinal and historical tangles with the result that the defender never gives serious attention to policy considerations favoring the broad scope of the modern writ. Nevertheless, a brief look at the complexities of the Suspension Clause is in order since critics of the modern writ flaunt the constitutionality of their proposed cures—relying implicitly on the faulty equation that not unconstitutional equals not unwise.

The question of the protection that the Suspension Clause offers against Congressional curtailment of the writ of habeas corpus is mired by the negative form of the clause and the historical expansion of the permissible scope of inquiry. These two elements can be used to make distended claims for Congressional power over the habeas corpus jurisdiction of the federal courts.

The broadest possible claim is simply that Congress is free to abolish all habeas corpus jurisdiction—for federal as well as state prisoners. It could, in other words, simply repeal §§ 2241-2255 (Chapter 153) of the Judicial Code dealing with "Habeas Corpus." The basis of this claim is a fundamental principle of the law of federal court jurisdiction; "Courts created by statute can have no jurisdiction but such as the statute confers."³² The implications of this principle have always been disturbing—especially the possible implication that Congress might use its power to restrict jurisdiction to do indirectly what it cannot do directly *i.e.* impinge constitutional rights.³³ For habeas corpus jurisdiction, the implication drawn is that since Congress could have declined to establish any federal courts below the Supreme Court, *a fortiori* it could and can create them without habeas corpus jurisdiction. Professor Paul Freund assails this implication: "[H]aving established Federal Courts Congress would be powerless to deny the privilege of the

32. *Sheldon v. Sill*, 49 U.S. (8 How.) 440, 449 (1850).

33. HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 312-40 (1953).

writ. Otherwise article I, section 9 would be reduced to a dead letter."³⁴ A rebuttal to Freund's dead-letter argument is possible. Even if abolition of all federal habeas corpus jurisdiction were allowed, the Suspension Clause could still be invoked to restrain Congressional suspension of habeas corpus review for state and federal prisoners by the *state* courts.

A more constrained claim is that whatever the situation of habeas corpus relief for *federal* prisoners might be, Congress clearly can withdraw federal habeas jurisdiction over state prisoners. Congress did not grant express statutory authority to inquire into the custody of state prisoners until 1867.³⁵ In 1845, the Supreme Court held that the federal courts had no habeas corpus jurisdiction over state prisoners and did not find it necessary to discuss the Suspension Clause.³⁶ The historical evidence thus strongly indicates that the Suspension Clause was directed to the availability of the writ in federal court only for persons in *federal* custody. A tentative attempt to find Constitutional protection for the writ for state prisoners has been made by relying on what may be called the "retroactive inflation theory." The theory holds that the protection of the Suspension Clause was somehow inflated or expanded by the adoption in 1868 of the fourteenth amendment with its extension of Bill of Rights guarantees to the actions of state governments.³⁷ So far the theory remains just that—a theory.

A final and most constrained claim is that even if the Suspension Clause protects habeas corpus jurisdiction for state and federal prisoners from congressional encroachment, the writ is protected only in its historically more limited scope of inquiry. At common law, and at the time of the adoption of the Constitution, habeas corpus functioned only to inquire into the legality of executive detention or detention imposed by courts without jurisdiction. Therefore, that must be the only variety of habeas corpus protected by the Suspension Clause.³⁸ The broader scope of the modern writ is

34. Brief for Respondent at 29, *United States v. Hayman*, 342 U.S. 205 (1951) (Paul A. Freund).

35. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

36. *Ex parte Dorr*, 44 U.S. (3 How.) 102 (1845).

37. See Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1272-74 (1970).

38. This is the argument presented in S. REP. NO. 1097, 90th Cong., 2d Sess.

attributable only to judicial interpretation of the Act of 1867. Again, an attempt to meet this claim has been made by relying on the Constitution-is-a-living-and-evolving-document argument. It is argued that the history of the writ "must have led them [the framers of the Constitution] to understand habeas corpus as an inherently elastic concept not bound to its 1789 form."³⁹

In summary, it is fair to say that the constitutional question of the Suspension Clause is fraught with uncertainty. It is hard to believe that the modern writ for state prisoners is fully protected against congressional action. On the other hand, it is equally hard to believe that the Supreme Court would allow Congress to withdraw federal court inquiry into the fairness and adequacy of state remedies for federal constitutional rights asserted in state criminal proceedings. Hence, continuation of the modern writ—the writ after *Brown v. Allen*⁴⁰—must be justified on its merits, not on the Constitution.

IN DEFENSE OF THE MODERN WRIT

Presentation of the basic justification for federal habeas corpus review of state court decisions on the constitutional rights of a criminal defendant is a delicate task. It is an awkward argument indeed to assert that federal judges can be better relied upon to apply in a sympathetic manner federal constitutional doctrine in criminal cases. Clearly there are many state judges who are fully competent to adjudicate constitutional rights, just as surely as there are federal judges who take a begrudging attitude toward the constitutional rights of criminal defendants. Hence even the most ardent civil libertarian would agree that some federal judges wear black hats and some state judges don white. But it is also clear that the justification lies not in terms of individual or personal merit or competence but rather in terms of class characteristics and propensities reasonably predictable from institutional factors.

While competent judging is in general a consuming task requiring the best qualities of the human psyche, the dispassionate applica-

(1968) in support of a provision limiting federal habeas corpus for state prisoners. 2 U.S. CODE CONG. & ADM. NEWS 2112, 2152 (1968).

39. *Supra* note 37, at 1269.

40. *Supra* note 12.

tion of the fundamental law—the Constitution—to determine the rights of persons accused of severely antisocial conduct requires even greater independence and force of personality. There are good reasons to believe that federal judges as a class are more apt to have these qualities than state judges as a class.

The key factor continues to be the security of tenure afforded by article III of the Constitution.⁴¹ It is not merely that life tenure insulates the federal judge from the popular pressures for law and order. Factors, other than the prospect of removal, do serve to alert federal judges to political considerations and popular sentiment. Rather, security of tenure is in effect a carrot that attracts the best qualified members of the legal profession to the federal bench. There is evidence that this was a major factor behind the provision for good behavior tenure in article III. Alexander Hamilton wrote in the *Federalist Papers*:

[T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the Government can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.⁴²

Evidence is abundant that the prestige and tenure of the federal bench continue to pull highly qualified members of the legal profession away from state judgeships. In the State of Washington, for example, two local federal judgeships in the district court (trial level) were recently filled by sitting members of the state supreme court. No one seems to doubt but that this was a step “up” for the individuals.

The argument is therefore that the federal bench tends to attract better legal minds, and that better legal minds yield fairer applications of federal constitutional guarantees to criminal defendants. To this may be added the “shoe-filling” effect. No matter

41. The tenure of state judges varies widely. In a significant number of states, judges must stand election and even face opposition periodically. *E.g.*, WASH. REV. CODE §§ 2.04.071, 2.06.070, 2.08.060 (1961).

42. HAMILTON, JAY & MADISON, *THE FEDERALIST* (No. 78) 510-11 (Modern Library Edition 1941).

how an individual's past may be identified with state interests and institutions, when he steps up to the federal bench he naturally tends to switch his allegiance and view matters from a national perspective. "The federal habeas court . . . is lodged in a different institutional setting, with different loyalties and assumptions which may foster greater hospitality to constitutional goals."⁴³ Together these factors yield an affirmative case of substantial weight for having federal judges redecide the legal merits of a state prisoner's constitutional defenses. The affirmative justification is thus weighty enough to compel a searching analysis of the countervailing factors urged to justify rolling back the scope of inquiry in federal habeas corpus proceedings for state prisoners.

RESENTMENT BY STATE JUDGES

Resentment of federal review of their decisions by state judges is certainly not a new phenomenon. The new wrinkle that is said to make such resentment more justifiable in the case of federal habeas corpus review is that lower federal courts, rather than the United States Supreme Court, do the reviewing. This is said to be unseemly and an affront to the dignity of the highest courts of the states.

Two questions should be asked about this "resentment" by state judges. How extensive is it in fact, and to the extent it exists, is it justifiable? It is true that an organized group of state judges—the Conference of Chief Justices—has expressed strong opposition to federal habeas corpus review for state prisoners.⁴⁴ But it is questionable whether this represents a pervasive sentiment among the judiciaries of the various states. Indeed, it is hard to believe how it could. Although the number of petitions filed is large, the chances that a trial-level state judge will see an individual convicted in his court obtain federal habeas corpus relief in a given year are minuscule. Widespread resentment against federal intrusion into state criminal proceedings surely exists, but the resentment is against the substantive and procedural rights that the United States Supreme

43. *Supra* note 37, at 1060-61.

44. *See Hearings on H.R. 5649 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess. at 32 (1955).

Court has developed for criminal defendants—not the habeas corpus remedy.

Hence there is little solid evidence of any of the “unanimity of . . . resentment among state . . . judges” upon which Professor Bator relies.⁴⁵ There probably is greater resentment among state law-enforcement officials, but that is attributable to the nuisance value that petitions for writs represent to prosecutorial staffs.

Assuming that some “resentment” does exist among state judges to federal habeas corpus review, the question remains as to the relevance of such “resentment.” One imminent state judge discounts it entirely:

The asserted unseemliness of review of the action of the highest state court by a single district judge does not seem impressive to me. . . . There is, of course, an understandable element of personal vanity and vexation involved. Every court would like all of its determinations to be final or, at most, to be reviewed only by the highest court.⁴⁶

Judge Jerome Frank considered the dignity of State courts to be more at stake, but thought the problem could be solved by providing Supreme Court review whenever a lower federal court set aside a judgment of conviction that had been affirmed by the highest state court.⁴⁷

Professor Bator stresses that the problem is not so much of “resentment” by state judges, but rather it is the alleged erosion of the state judge’s “inner sense of responsibility” and his “pride and conscientiousness.”⁴⁸ But it is dangerous to predict so confidently what will be the effect on a decision-maker of opening up additional avenues of recourse from the decision. Some judges steam ahead seemingly oblivious to the prospects of later review. Others adopt a casual “if-I’m-wrong-I’ll-be-reversed” attitude. Still others dread reversal as a personal insult and ponder decision on questions of law almost to the point of paralysis. In short, the alleged “resentment” of state judges adds little or nothing to the case against modern federal habeas corpus.

45. *Supra* note 19, at 504.

46. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 22 (1956).

47. *Supra* note 44, at 16.

48. *Supra* note 19, at 505-506.

EFFECT ON THE AIMS OF THE CRIMINAL LAW

The argument that federal post-conviction review of state convictions has an adverse impact upon the substantive aims of the criminal law has two prongs. The first prong is best summarized by a statement found in a 1968 Senate Report:

The delay in the enforcement of the judgments of conviction in the State courts is perhaps the worst feature of the habeas corpus proceedings in the Federal courts by State prisoners. It is a serious factor in bringing about the unfortunate delay of criminal justice in the United States that contributes to disrespect for the laws.⁴⁹

This "enforcement delay" argument is deceptive and misleading to persons not familiar with criminal procedures. The argument openly implies that a defendant in a criminal case can delay execution of the judgment against him for substantial periods of time by resorting to federal habeas corpus. This is inaccurate. The inmate must begin serving his sentence before he can pursue the federal habeas corpus remedy. Indeed, custody is the jurisdictional prerequisite for habeas corpus review.⁵⁰ Hence as a general matter the state prisoner is serving his sentence while he pursues his federal remedy. In only one category of cases does federal habeas corpus effectively delay administration of the state criminal judgment. The category is capital cases where, in fact, the sentence of death is stayed pending federal review.⁵¹

The second prong is more respectable but also more speculative. It suggests that a prisoner is less likely to respond to rehabilitation efforts if he has not psychologically accepted the justice of his conviction. Since federal habeas corpus holds out the chance—however remote—that a conviction could be overturned at any time, convictions are never really final. This lack of finality, it is argued, is an obstacle to the requisite attitude of penitence. The quick and best answer is that the effect of habeas review upon rehabilitation is speculative and not verified by any empirical evi-

49. S. REP. NO. 1097, 90th Cong., 2d Sess. (1968) (quoting the Standing Committee on Jurisprudence and Law Reform of the American Bar Association) 2 U.S. CODE CONG. & ADM. NEWS 2112, 2151 (1968).

50. 28 U.S.C. § 2241(c)(3) (1968) extends the writ to persons "*in custody* in violation of the Constitution or laws or treaties of the United States." [Emphasis added]

51. The cases cited in the Senate Report, *supra* note 49, in which delays of up to twelve years were recorded, involved the death penalty.

dence.⁵² But the ready appeal of the argument to common conceptions about inmates and rehabilitation dictates that further analysis in rebuttal be offered.

An important initial point is that correction officials deliberately create a tension between access to post-conviction relief and rehabilitation of the inmate. There is often a well-understood though unwritten policy in a prison that inmates with pending "writs" are excluded from minimum security status or from various affirmative programs such as work or study release. A recent decision of the Pennsylvania Supreme Court upheld the policy of the state parole board to refuse to consider requests for parole by inmates with pending writs.⁵³ Thus, any diminution of rehabilitation in fact caused by habeas corpus review might be eliminated by changing the questionable policies of prison administrators.

All discourses on "rehabilitation" should pause at the threshold and inquire into what is meant by "rehabilitation." One judge recently observed: "Totalitarian ideologies we profess to hate have styled as 'rehabilitation' the process of molding the unorthodox mind to the shape of prevailing dogma."⁵⁴ The point is that in a free and pluralistic society the goal of rehabilitation should be confined to inducing the offender not to commit violations of the law in the future, rather than to mold him into someone's image of the model citizen. And clearly it should not be to mold him into a citizen who humbly accepts and submits to the mores of the "establishment."

With the concept of rehabilitation suitably limited, the impact of post-conviction relief can be put into perspective. First, there is a serious question as to whether current prison programs and personnel are achieving any substantial amount of rehabilitation.⁵⁵ If

52. *Supra* note 37, at 1058: "And whether society's interest in rehabilitation is furthered or hampered by extending the process is a matter of conjecture."

53. *Brittingham v. Commonwealth*, 442 Pa. 241, 275 A.2d 83 (1971). The excuse for such policies is that the prison administration and parole board should not have to expend their energies in attempting to help the inmate since those energies would be wasted should the inmate's writ be successful. The excuse ignores the fact that few writs are in fact successful and that even successful writs normally win only a new trial.

54. *Sobell v. Reed*, 327 F. Supp. 1294, 1305 (S.D.N.Y. 1971).

55. This is underscored by the currently higher rates of recidivism. For example, of those committed to federal institutions in fiscal 1968, 53.9% had "known previous

they are not, psychological barriers to participation in such programs may be harmless at best. At such time as substantial rehabilitation is in fact undertaken, this objection to post-conviction relief might be renewed. Second, there are many inmates for whom post-conviction procedures are positively rehabilitative. Time spent working on their "writs" keeps them from idleness and immersion in unhealthy prison subcultures.⁵⁶ Such time also awakens many inmates to other aspects of the legal process. It may, for example, alert them for the first time to the existence of legal rights of inmates in penal institutions and some of the remedies for violations of those rights.⁵⁷

The case, however, should not be overstated. Undoubtedly there are some inmates who adopt unreasonable attitudes of righteous defiance and cling to the hope that they will soon be released from wrongful incarceration. The cure for them, however, is not to cut off access to post-conviction relief from all inmates. Rather it is a combination of sober and realistic legal advice about the prospects of a writ and expeditious processing of writs by the courts.

BURDEN ON THE FEDERAL COURTS

It is easy to build up an impressive statistical argument for the proposition that the federal courts are being flooded under a pile of petitions for writs from state prisoners. One can point out, for example, that in the nine-year period from 1962 to 1970 the number of such petitions filed annually rose from 1408 to 9063.⁵⁸ These

commitments; 36.2% had two or more." See U.S. DEPT. JUSTICE, FEDERAL BUREAU OF PRISONS STATISTICAL REPORT FISCAL YEARS 1967 AND 1968, at 40 (1968).

56. "... I am inclined to believe from the little that I hear about these things that actually the availability of collateral relief is a very wholesome form of therapy in the prisons. It keeps the men from planning jail breaks, and the wardens say 'fine, if you can have a jail delivery by order of the Supreme Court, we are all with you; just do not use a pick and shovel.' It puts them in the law library at the penitentiary, and we all agree that that is a very healthy state of affairs. It gives them something to hope for. On balance, I am inclined to think that it is probably better penology than the strict closing of doors." *Symposium, Habeas Corpus—Proposals for Reform*, 9 UTAH L. REV. 18, 30 (1964) (remarks of Paul A. Freund).

57. See, e.g., *Noland v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971) (right to correspond with the press); *Clutchette v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971) (right to due process in prison discipline).

58. 1970 *Dir. Adm. Off. U.S. Courts Ann. Rep.* 121 (1971).

petitions constituted 10.4% of the total civil cases filed in the federal district courts in the fiscal year 1970.⁵⁹ However, this much-heralded "flood" of writ petitions and the resulting "burden" on the federal courts have been greatly exaggerated, and it is time the exaggeration is challenged.

The source and significance of the statistics should first be examined. The source is inevitably the annual reports of the Director of the Administrative Office of the United States Courts. The Director's statistics are obtained from the clerks of the various district courts who report on the number of cases filed in various categories. Court clerks are not interested in keeping the statistics on the number of cases filed in their districts low. The higher the numbers the stronger is their claim for a bigger budget and a bigger clerical staff. The result is undoubtedly that the meter turns almost every time some piece of paper is received from a prison inmate. It does not matter how inartfully the petition is drawn or how quickly it is dismissed. It counts as a state habeas corpus petition filed. A very high portion of writs are probably summarily dismissed on one of two common grounds. The first is failure to allege sufficient exhaustion of state remedies.⁶⁰ The second is failure to meet the standard of indigency required to file the petition in forma pauperis.⁶¹ Both involve virtually no effort by a judge and a minimal amount of an administrator's time. Most of the balance of petitions are probably almost as readily dismissed.⁶²

Thus, the statistics are deceptive as to the burden they represent if uncritically compared to an equivalent number of filings of ordinary civil cases. This point is re-enforced by the statistics on the termination of cases. Of the 8281 prisoner petitions terminated by

59. *Id.* at 110. The Report lists prisoner petitions as 18.3% of the civil cases commenced. This figure includes federal as well as state prisoners and petitions by prisoners other than habeas corpus attacks on convictions.

60. 28 U.S.C. § 2254(b) requires exhaustion of all state remedies. The petitioner must affirmatively allege that he has presented the very same claim to the state courts. *Picard v. Conner*, 404 U.S. 270 (1971).

61. The decisions have required an inmate with as little as \$78 in his prison account to pay the \$15 filing fee. *In re Stump*, 449 F.2d 1297 (1st Cir. 1971).

62. Many petitions are dismissed because the federal courts impose strict fact pleading requirements. *Aubut v. Maine*, 431 F.2d 688 (1st Cir. 1970). Many are dismissed because the inmates pleaded guilty. The Supreme Court has strictly narrowed the grounds for post-conviction attack on guilty pleas. *McMann v. Richardson*, 397 U.S. 759 (1970).

court action in fiscal 1970, 95.1% were terminated before trial. With the typical personal injury civil suit, only about seventy percent are terminated before trial.⁶³ Even when a "trial" is held in a habeas corpus proceeding, it is generally a short and simple evidentiary hearing and never involves a jury.⁶⁴

More fundamentally, the very premise of any argument that federal judges are too burdened by prisoner petitions should be challenged. The premise is that they would be better spending their time on something else. Critics of habeas corpus rarely ask whether there are other aspects of federal court jurisdiction that could be more appropriately eliminated in order to ease federal court congestion. One conspicuous category is that of state law personal injury actions filed under the diversity of citizenship jurisdiction. In fiscal 1970, 13,794 of these actions were filed.⁶⁵ The question should be asked: is it not better to get federal judges out of the state law personal injury business, where state courts are the experts, than out of the business of adjudicating questions of federal constitutional rights in habeas corpus proceedings? Prisoner petitions are selected for the suggested economy simply because prisoners lack political clout.

CONCLUSION

It is not the point of this article to suggest that all is well with the writ of federal habeas corpus for state prisoners. Steps do need to be taken to reduce the number of frivolous petitions and to increase the attention paid to non-frivolous petitions. The point is that the resurrection of arbitrary barriers of finality is no solution. Rather than cut off the state prisoner's right of access to a federal court for some or all of his federal constitutional claim, we should develop "more efficient tools and machinery" for the search to ferret out constitutional error in criminal proceedings.⁶⁶

Some of these tools should be used before, during, and immediately after trial. One such tool that has been suggested is the "Om-

63. *Supra* note 58, at 245a-245c.

64. There is no right to a jury trial in habeas corpus. *O'Keith v. Johnston*, 129 F.2d 889, 891 (9th Cir. 1942).

65. *Supra* note 58, at —.

66. See Lay, *Post Conviction Remedies and the Overburdened Judiciary: Solutions Ahead*, 3 CREIGHTON L. REV. 5, 32 (1970).

nibus Pretrial Hearing.”⁶⁷ The point is that anticipatory action can either avoid a post-conviction challenge or lay a complete record for easy disposition of any that should occur.⁶⁸

Other tools should be employed to improve federal habeas corpus procedures themselves. First, better provision could be made for rendering legal assistance to prison inmates.⁶⁹ A lawyer or law student can examine the inmate's claim. If the claim is plainly without merit, the counselor can usually explain the situation to the inmate's satisfaction. If the claim has some merit, the counselor can draft a clear petition setting forth the relevant facts and law. In either instance, the burden on the courts is reduced. Second, federal magistrates might play a greater role in handling prisoner petitions.⁷⁰ A magistrate, for example, could visit the state institutions and hold informal preliminary hearings with the petitioning inmates present. Finally, uniform rules of procedure for federal habeas corpus should be developed.⁷¹

67. *Id.* at 14-16, 23-29.

68. The Supreme Court itself has developed a number of constitutional rules of criminal procedure with an eye to easing the burden of federal habeas corpus proceedings. For example, in *Boykin v. Alabama*, 395 U.S. 238 (1969), the Court held that a state judge must make an affirmative record that a defendant's guilty plea is voluntarily made before accepting it. The existence of such a record facilitates disposition of any post-conviction attack on the guilty plea on grounds of coercion.

69. Law school prisoner assistance programs are making headway toward providing such assistance. See, e.g., 1 PRISON L. RPTR. 65, 79 (1972) (24 programs listed). Law student resources need to be supplemented, however, by the private bar. See generally *Hearings on Prisoners' Representation Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., ser. 15, pt. 3 (1971).

70. See Note, *Proposed Reformation of Federal Habeas Corpus Procedure: Use of Federal Magistrates*, 54 IOWA L. REV. 1147 (1969).

71. An advisory committee to the federal Judicial Conference has undertaken the task of drafting such rules but has yet to produce such a draft. See note 37, at 1158 n.27, *supra*.